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No. 99-431

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE ATLANTIC CITY POLICE DEPARTMENT,

Petitioner,

v.

SERGEANT DONNA M. HURLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in a sexual discrimination case arising under 42 U.S.C. § 1983, Title VII, and the New Jersey Law Against Discrimination, a general verdict for plaintiff found to be supported by the greater weight of the credible evidence by both the District Court and the Court of Appeals, and resulting from a jury instruction indisputably correct under state law, this Court should review the matter based upon a claim of improper application of the Harmless Error Doctrine.[1]

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1. The Harmless Error Doctrine was codified in 1938, with the adoption of Fed. R. Civ. P. 61.

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Respondent, Donna Hurley, respectfully requests that no Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit, entered in this matter on March 18, 1999, and thereafter amended on May 11, 1999.

OPINIONS BELOW

The Opinion of the United States Court of Appeal for the Third Circuit is reported at 174 F.3d 95. (App. 1-103).

The Opinion of the United States District Court for the District of New Jersey is reported at 933 F. Supp. 396. (App. 119-200).

STATEMENT OF JURISDICTION

Respondent refers the Court to the Petitioner's Statement of Jurisdiction.

STATUTORY PROVISIONS INVOLVED

In addition to the two statutes cited by Petitioner, Respondent refers the Court to the New Jersey State statute upon which the Third Circuit relied in its affirmance, N.J.S.A. 10:5-1, *et seq.*, commonly known as the Law Against Discrimination ("LAD").

STATEMENT OF THE CASE

Respondent agrees with the first two paragraphs of Petitioner's Statement of the Case, but objects to most of the factual representations following those paragraphs, inasmuch as they do not set forth the facts in the light most favorable to the Respondent, who prevailed below. Respondent submits the following facts, upon which the Third Circuit relied in its affirmance.

Although New Jersey first enacted the LAD in 1945, Donna Hurley was the first female to successfully complete the Atlantic City Police Academy in 1978. Prior to that time, ACPD female policewomen were required to wear such authoritarian garb as little cowboy hats and skirts. (A1215-16). From the day of her admission into the police academy through the trial of this matter and continuing to date, Donna worked in a malicious and viciously misogynistic environment that was one of gross disrespect, indignities, and indecencies. (A2415-19). Sexist slurs were and are routinely used to refer to females; for example, the police academy trainees were referred to as "the runts and the cunts", with Donna receiving the particularly opprobrious epithet of "the wacky cunt", even from ACPD captains and inspectors. (A412-414; 442; 397-409; 437-440; 503-505; 520-522; 1039-1047; 2388-89). Male police officers were so confident of the ACPD's unwillingness to discipline them for such slurs that Sergeant Yard openly referred to Prosecutor Martha Donovan in a hallway packed with citizens and attorneys as "a fucking cunt", which has not yet resulted in any investigation or discipline by ACPD. (A831-834; 1229-1233). From Donna's initial hiring to the present, derogatory sexist terms were customarily used by the rank and file in the presence of superior officers without fear of adverse consequence, such as referring to female police officers as "cunts", "the crack troops", "douche bags", and "broads", continuing up to the week of trial. (A602-605; 642-644; 655-669; 2388; 2394-97). Madamba, Hurley's immediate supervisor for most of 1990, personally referred to Donna as a "dumb cunt". (A884-887; 909-910; 923; 4422). Captain Rongione and Captain Glass also used derogatory terms to refer to females. (A554-558; 503-505; 541-543).

The hostile environment was by no means limited to verbal abuse; there was overwhelming evidence of "an institutionalized practice", to use the words of Inspector Snellbaker, of obscene writings and drawings displayed throughout the ACPD since at least 1968. (A255-258; 363; 371-75; 500-502; 528-535; 579-581; 583-589; 590-596; 1086-1095; 1144-1147; 1845-1856; 1863-65; 1939; 4193-4196; 4262-66; 3897-98). After Donna was promoted to Sergeant in 1987 and assigned to Charlie Platoon (11 p.m. to 7 a.m.) in 1990, she became the primary focus of the "artwork", (A1108-1109; 1139-1144), with P1 being a typical depiction: a nude woman on her hands and knees with her vagina not only clearly displayed but actually outlined in red, accompanied by doggerel referring to anal penetration and ejaculation in her face, posted in the Department for literally years. (A688-690; 696-699; 961-966; 1947-1949). Very few such drawings were of males. (A965). As of the date of the trial, the ACPD still had made no effort whatsoever to investigate the persons responsible, to impose discipline, to educate and train the officers as to the gross impropriety of such conduct, or indeed to do anything other than, on a few occasions, paint over the drawings, apparently to provide a clean canvas for the next foul depiction. There was ample evidence that the existence of these drawings were known throughout the highest levels of the ACPD, (A275-280; 1300-1304; 3207-09), particularly since a lifesize nude depiction of Donna engaged in sex was on the roll call room wall, (A751-758), where most officers were required to assemble at the beginning of each of three shifts on a daily basis, while roll was called either by a Sergeant or Captain. When Officer Dottie Smith removed a depiction of Donna from a restroom wall, it not only reappeared the next day with a reference to Smith, (A371-375; 696-705; 711-712), but resulted in her being chastised

by Sergeant Fair (since promoted to Captain in charge of Internal Affairs) for violating the "First Amendment rights" of the artist! (A712-717). Fair has also never been disciplined. Perhaps the most egregious aspect of these drawings was the fact that they were permitted to persist in restrooms available to the public, such that Donna's young daughter, Brittany, was exposed to one depicting Donna performing fellatio when her father allowed her to go to the restroom when she came to visit her mom at work. (A1278-12180; 1982-1984). Although the jury did not hear about the most dire consequence, that being Brittany's subsequent suicide attempt, the record is clear that Donna was aware of this event and of the ACPD's willful refusal to respond. (A1441-1443).

Not content with merely subjecting its female employees to a daily diet of verbal and pictorial abuse, the department also routinely allowed the introduction of graphic sexual appliances, magazines and feminine hygiene products into the workplace, with utter indifference the only response from upper management. (A1618-1619; 1632-1635). Thus, when Donna was assigned to Charlie Platoon, a dildo was affixed either to the wall or the podium in the roll call room. (A429-431; 1036-1038; 1059; 1147); Madamba, who now seeks to portray himself as Donna's guardian angel, admitted driving around Atlantic City on a Sunday morning with a dildo affixed to his ACPD car antennae, lamely claiming that he did not have the time to reach out, as he walked by, to remove it before starting his tour of duty. (A4448-4450). Madamba also refused to order removal of a sanitary napkin, emblazoned with red sergeant chevrons and hanging over the podium from which plaintiff was required to call roll, for three days, or nine full tours of duty, in what can only be construed to be a deliberate attempt to humiliate and

embarrass Donna, the napkin being replaced even after it was removed on more than one occasion. (A422-429; 765-770; 1030-1036; 2492-98). Though this event was known throughout the ACPD, and was reported directly to Captain Burrus (A1070-1071; 1075-1078), ACPD has done nothing to investigate or discipline those responsible even to this very day. Plaintiff had similar events happen to her in the academy, involving tampons hanging from her ACPD vehicle mirror, Hustler magazines left in her vehicle, dildos being openly displayed at academy premises, and officers using their police batons to depict an erect phallus while standing behind Donna; contrary to ACPD claims that she was "hypersensitive", at no time did she let those responsible for any of this sexist ridicule see just how badly it hurt her.

Defendant Mooney, who was aide to the Chief and his personal confidante until approximately April, 1990, (A1972-73), suggested to plaintiff in that year that she had been "under the Captain's desk", an obvious reference to oral sex; in Madamba's presence he said he had heard she liked them "hard and stiff", advised her that she could drink her coffee from his "jock cup", and routinely ridiculed her at the workplace, referring to her as a pencil pusher who laid on her back. (A2512-17; 2660-62). This was consistent with Mooney's appalling 1992 conduct toward Officer Deborah Rando, who was not only verbally abused by Mooney, (A929-933), who falsely called her a liar, falsely claimed that she had endangered another officer's life, and badgered and berated her to the point of tears, (A941-947), but who engaged in such grotesqueries as telling Rando that he had considered placing mayonnaise on her leg while she dozed during a break, in order that she would wake up and believe it to be ejaculate. (A933-936). On another occasion, he asked what was between Rando's legs, stating that he would like

to be the soda can there. (A936-939). His abuse of her was so bad that Rando was forced to involve the PBA President, after her complaints to Captain North about his misconduct resulted in the captain inviting her to his house for dinner. (983-985; 968). Again, there was no investigation of either North or Mooney, and while ACPD generated documentation falsely suggesting that Mooney had been "counselled" (but *not* reprimanded or otherwise disciplined), Mooney admitted even that was untrue. (A2048-2054). Mooney was not even mildly upset about Rando's complaint. (A4146-47). Not only has the ACPD refused to investigate Mooney, but in fact he has since been promoted to Captain and has acted as the ACPD Legal Affairs Officer.

In conduct similar to that of Captain North, Madamba's response to Donna's request that he do something to control the disrespectful and insulting behavior of the "gang" of officers on Charlie Platoon was a suggestion that in private industry, females who have affairs with their supervisors are protected as a result. Madamba had harassed plaintiff and sought to induce her to leave the all-male Charlie Platoon (A4312-13) from the beginning, telling her that he did not expect her to be on it very long, claiming she was inept (A4326-29), requesting that she make a false application for a hardship transfer to another platoon, and when she refused to falsify such a request, surreptitiously requesting that she be swapped with a male captain. (A4307-4310). He further sat idly by while male officers treated her with insolence and disrespect. In March, 1990, she requested that he intercede, at which time he suggested a sexual relationship, telling her that he loses weight by having sex two times a day, that women come to him when they are ready, and that while harassment happens to women in private industry, women get protection from such harassment by sleeping with

their superiors. (A2498-2508). When she complained that she had not received back up from her male officers, and that they repeatedly "clicked" her out so that she could not communicate on a radio, (A2546-47), Madamba did nothing. Madamba made fish references (A2540-41) and openly laughed at obscene caricatures of her; when asked to take down the sanitary napkin, he told a sergeant to leave it up. (A4344-46; 4408-4410). Ultimately, he advised Donna in September, 1990, that with the new recruits coming out of the Academy, he was asking to swap her for a male sergeant, telling her that she was not effective as a female supervisor, admitting that she had been repeatedly harassed, and telling her that the "higher ups" in the Department agreed with him. (A2553-58). When she responded that she would sue for discrimination if he did swap her, Madamba continued his campaign of retaliation, inducing the Chief to issue a letter threatening to demote her, (A2560-67), based on a false allegation of abuse of sick time, despite there being numerous male officers on Charlie Platoon whose personnel files confirm that they had in fact been abusing their sick time who received no warning letters whatsoever. Although the Department has claimed that Donna's letter was merely a departmental form, the parties stipulated, in response to a subpoena, that only one other officer had received such a letter during that time period (A3231-32), despite Acting Chief McDuffy's sworn testimony that he had sent out 60 to 90 such letters at that time. After Donna declined his advances, the retaliation began. Madamba routinely belittled the plaintiff, sending subordinate patrol officers to check up on her work, giving her contradictory instructions in order to ridicule her in front of roll call, and telling her that she should not send prisoners complaining of injuries to the hospital, as required by the Eighth Amendment, going so far as to say that she should "let them die". (A2521-25).

He falsely noted a verbal reprimand in her file, then fabricated a benign evaluation of her. (A4428-29; 2735-38). Madamba gave male sergeants with less seniority plaintiff's requested days off (A2655), and did the same with plaintiff's requested vacation time. (A2561-63). This ten-month period of abuse resulted in plaintiff requesting that she be transferred from Madamba's supervision, while asking to remain on the same shift; when Chief Rifice learned of Madamba's misconduct, he admitted he was not surprised. (A3101-03).

To complement its practice of requiring women to consistently work in a hostile environment, the ACPD has a history of giving women demeaning, "dead end", non-supervisory positions. (A957-959). Plaintiff is a perfect example. After she became a sergeant in 1987, she was assigned to the Detective Bureau for a few weeks, which was the last time she was in a position to command any men until she came under Madamba's supervision on Charlie Platoon in 1990. (A1225-1229; 2431-36). During the interim, she was the court liaison officer, a timekeeper supervising no one, (A1244; 2439-42), then in charge of the "Truancy Task Force", which position consisted only of Hurley and two civilian subordinates, gave her no responsibility, and isolated her a mile from the police premises. (A2462-69). Before becoming a sergeant, she was required to sit in her vehicle alone and watch a building to make sure that no arsonists burnt it down for a period of six months, which assignment was never given to any male. (A2423-27). Donna appears to be the only person ever assigned by the police chief to a desk sergeant as a permanent assignment (A2473-77), which required her to work in a building so cold and dank in the winter and so hot and humid in the summer as to be called the "Temple of Doom", a job that was so undesirable that it was usually rotated amongst sergeants, as

the undisputed testimony confirmed. (A2030, 2076-77; 2480-81; 1485-89). After she could no longer endure Madamba's harassment and requested in writing that she be transferred out from under his command, but still remain on Charlie Platoon, (A1316-1319), she was transferred to yet another dead-end, demeaning clerical job, being put in charge of records and evidence, with special hours of 6:00 p.m. to 2:00 a.m. created and designated for her, and her alone. (A332-334; 357-360; 2517-19). To make certain that the Department got the message through to her as to the consequences of complaining of sexual harassment, she was subjected to a number of frivolous Internal Affairs investigations of her conduct while in charge of evidence, but was always exonerated. Although every single one of her supervisors admitted that she was an excellent employee who did more than competent work, and in fact she received an award for heroism from the Department and was selected as one of the ten most distinguished women by the Atlantic County Women's Advisory Committee (A2685-86), Madamba and the Department attacked her as an incompetent coward.

Regarding the Petitioner's inaccuracies, the ACPD has failed to advise the Court that Hurley did complain to Madamba about the roll call room graffiti, and was told in response that she must "ignore it". (A2768-2769). Regarding the sanitary napkin displayed with sergeant's stripes, Hurley unequivocally testified that she did complain to Madamba. (A2763). Petitioner's citation to the record pertaining to its allegation regarding "clicking out" and the belittlement at roll call are both inaccurate. (A4355; A2750). Moreover, Petitioner's claim that Dr. Hoyme, plaintiff's treating psychiatrist, testified that plaintiff's condition was "not severe", is flat out false; Dr. Hoyme testified, in no uncertain terms, that the psychological pain inflicted upon Hurley by the obscene depictions of her caused "the worst psychological pain one could experience by

any means. But I think it is, I think it's severe pain." (A1729; A1731). For this misrepresentation alone, the Petition should be denied.

REASONS FOR DENYING THE WRIT

THE THIRD CIRCUIT OPINION WAS FAIR, PROPERLY DECIDED, SUPPORTED BY THE FACTUAL RECORD, AND CONSISTENT WITH THE STATE LAW CLAIM PRESENTED.

Pursuant to Rule 10, certiorari is to be granted "only for compelling reasons." An accurate review of the record below amply establishes the propriety of denial of the Petition pursuant to Rule 14.4.

The foundation of Petitioner's argument is the incorrect notion that this Court's recent decision in *Burlington Industries Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), should control the outcome of this case, which was tried years earlier, despite the well supported findings by the majority that "even if the jury instructions are not quite right with regard to *Faragher*, there is no colorable argument that they misstated New Jersey law." (App. 47-48). Indeed, both the majority and the dissent agree that the disputed charge is completely consistent with the New Jersey Supreme Court enunciation of the cause of action in *Lehmann v. Toys 'R Us*, 626 A.2d 445, at 452 (N.J. 1993). (App. 49, n.19; App. 83). Under New Jersey law, a *quid pro quo* claim "involves an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotions, or suffer other adverse

employment consequences." *Lehmann*, *supra*, 626 A.2d at 452. New Jersey law has never required that a *quid pro quo* claim be supported by the additional element of proof of a tangible employment action as a result of the refusal to accede, such that New Jersey law is substantially different from, and more expansive than, Title VII law on this particular issue. (App. 49, n.19; App. 85, n.2).

Not only was the District Court's charge to the jury absolutely correct under New Jersey law, it is undisputed that the Petitioner never submitted a request for charge containing the *Burlington Industries* definition, such that the issue was not preserved at the District Court level, and should not occupy this Court's time. It would be unfair in the extreme to Respondent Hurley were a recent decision of this Court to be applied retroactively to upset a lower court decision squarely supported by an accurate jury charge on state law at the time of the jury's decision. There is no proof whatsoever that there are any other cases pending which would turn on a resolution of the issue advanced by Petitioner. *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1965). Given the absence of proof of the existence of such other cases, and the absence of adequate time for the District Courts and Circuit Courts of Appeal to digest *Burlington Industries*, this issue is not yet ripe for review; this argument is further supported by the absence of any indication that the New Jersey Supreme Court would redefine a *quid pro quo* cause of action so as to modify the *Lehmann* definition to comport with the *Burlington Industries*' definition.

Respondent further submits that there is no real or intolerable conflict amongst the circuits, contrary to the argument of the Petitioner, inasmuch as the decisions cited

were based on their particular facts. As noted by the majority opinion, the cases upon which it relied are readily distinguishable from those relied upon by the dissent, with the dissent cases involving circumstances under which the record made it impossible to determine the basis for the jury's decision. (App. 51-53, n.21, n.22). Moreover, given the abundance of cases there cited, it appears that this is not a "novel" issue, nor is the conflict one which could reasonably be construed to be intolerable; indeed, there are plenty of conflicts, such as this one, on a variety of legal issues amongst the various circuits that do not even come close to being those that are so intolerable as to mandate the utilization of this Court's limited temporal resources.

Although the Petitioner and the dissent both claim an absence of factual support for plaintiff's judgment, both the District Court, which sat through the trial, and the majority opinion determined the facts in favor of the plaintiff; under such circumstances, certiorari is inappropriate. *See, e.g., Graver Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

The last argument raised by the Petitioner is the notion that the Judgment appealed from would result in no time savings. Respondent respectfully disagrees. This case has already occupied nearly eight years of Respondent's time, an experience she shares with numerous other litigant-employees of Atlantic City, every one of whose discrimination cases is being defended "tooth and nail". Were this Court to deny the Petition, the Judgment confirming a hostile work environment will be final, and can be utilized to avoid the necessity to adduce proofs in many of those other cases, resulting in literally weeks, if not months, of trial time being saved. Respondent respectfully submits that

both Judges Becker and Scirica undoubtedly had this factor in mind, based upon information disclosed to the Court in oral argument pertaining to the other outstanding cases. Respondent further submits that a denial of the Petition may encourage the Petitioner to approach settlement realistically, and could perhaps even induce it to modify its settlement position by increasing its offer above the last and only one of $2,000.

CONCLUSION

Based upon the facts, law, and arguments set forth above, Respondent respectfully submits that the appropriate disposition of the Petition for Certification is denial.

Respectfully submitted,

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